



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2010

Mr. Joe R. Tanguma
Walsh, Anderson, Brown, Gallegos and Green, P.C.
For Highland Park Independent School District
P.O. Box 168046
Irving, Texas 75016

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OR2010-12542

Dear Mr. Tanguma:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 390773.

The Highland Park Independent School District (the "district"), which you represent, received four requests from the same requestors for certain e-mails between a named individual and the requestors during a specified time period; specified correspondence between two named individuals; and specified correspondence regarding the requestors' child. You state the district has withheld some of the responsive information and redacted student-identifying information from the information submitted to this office pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).¹ You assert the requested information is not subject to the Act. Alternatively, you claim the requested information is excepted from disclosure under section 552.103 of the Government Code. We

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

have considered your arguments and reviewed the submitted representative sample of information.²

We begin by addressing your claim the present request is not a request for information under the Act. You inform us the requested information relates to a pending due process hearing involving the requestors. You state the discovery methods in a due process hearing are "limited to those specified in the Administrative Procedure Act ([“]APA[”]), Texas Government Code, Chapter 2001 . . . [and] discovery between parties engaged in a contested case such as the one at issue here is conducted under the Texas Rules of Civil Procedure.” You argue that because legal authority already exists that governs the production of documents, the request is not subject to the Act. Section 552.0055 of the Government Code provides “[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under [the Act].” Gov’t Code § 552.0055. This section does not apply in all instances in which a governmental body could have received such a subpoena or discovery request. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999) (stating in interpreting statutes, goal of discerning legislature’s intent is served by beginning with statute’s plain language because it is assumed legislature tried to say what it meant and its words are, therefore, surest guide to its intent); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 324 (Tex. App.—Austin 2002, no pet.) (*citing Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex.1994)) (“In applying the plain and common meaning of a statute, [one] may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning, especially when [one] can discern the legislative intent from a reasonable interpretation of the statute as it is written.”).

You do not assert the requests the district received are in fact subpoenas duces tecum or requests for discovery that were issued in compliance with a statute or a rule of civil or criminal procedure. *See* Gov’t Code § 552.0055. Nothing in the requests reflects they meet the elements of a subpoena duces tecum. *See* Code Crim. Proc. arts. 24.02 (defining subpoena duces tecum), .03 (describing procedures for obtaining subpoenas, including subpoena duces tecum). Furthermore, you have not demonstrated, and the requests do not indicate, the requests for information constitute discovery requests issued in compliance with a statute or a rule of civil or criminal procedure. In their requests, the requestors list the “Open Records Act/Texas Public Information Act” as the basis for requesting the information. Although discovery in a contested case is conducted under the Texas Rules of Civil Procedure, there is nothing that prevents the requestors from also submitting requests for information under the Act. Therefore, we find the district received requests for information under the Act. Accordingly, we will consider your claimed exception to disclosure for the requested information.

²We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Section 552.103 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and have provided documentation showing, that prior to the district's receipt of the requests for information, the requestors requested a due process hearing before the Texas Education Agency. You explain the due process hearing is a contested case hearing, which is governed by the APA, chapter 2001 of the Government Code. This office has concluded a contested case under the APA constitutes litigation for purposes of the statutory predecessor to section 552.103. Open Records Decision No. 588 (1991). Based on your representations and our review, we determine litigation was pending on the date the district received the requests for information. You state the requested information is related to the pending litigation because it pertains to the issues that help form the basis of the litigation. Based on your representations and our review, we find the requested information is related to the pending litigation for the purposes of section 552.103.

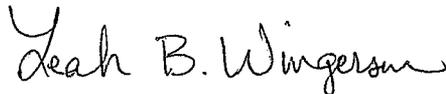
We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a). In this instance, the requestors have already seen the requested e-mails sent to or received from them. Therefore, because the

opposing parties in the pending litigation have seen this information, it may not be withheld under section 552.103 of the Government Code. As you have not claimed any other exceptions to disclosure for this information, it must be released.³ However, the remaining requested information may be withheld under section 552.103 of the Government Code.⁴

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 390773

Enc. Submitted documents

c: Requestors
(w/o enclosures)

³We note the information being released includes one of the requestors' e-mail address that is generally confidential under section 552.137(a) of the Government Code, to which these requestors have a right of access under section 552.137(b) of the Government Code.

⁴We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).